IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL JURISDICTION
WRIT PETITION (L) NO.3056 OF 2005

M/s. Qmax Consultants Pvt. Ltd. ...Petitioners

Vs.
The Municipal Corporation of Greater
Mumbai & Ors. ...Respondents

Mr.T.N. Subramaniam, Senior Advocate i/by Kishore Takhordas and Co. for the Petitioners.

Mr. K.K. Singhvi, Senior Advocate with Ms Aruna Savla for the Respondent Nos.1 to 3.

None for the Respondent Nos.4 to 7.

CORAM : H.L. GOKHALE AND
ABHAY S. OKA, JJ.

DATE ON WHICH JUDGMENT IS RESERVED : FEBRUARY 16,2006.

DATE ON WHICH JUDGMENT IS PRONOUNCED: FEBRUARY 28,2006.

JUDGMENT (Per A. S. Oka, J.):

1. By this Petition under Article 226 of the Constitution of India, the Petitioners have taken exception to the action of the Respondent No.1-The Mumbai Municipal Corporation of appointing the Respondent Nos.4 to 7 as consultants for the work of quality audit of road works in the city of Mumbai and suburbs. The challenge in this Petition is mainly on the ground that the contracts have been awarded to the Respondent Nos.4 to 7 without inviting tenders as required by Section 72 of the Bombay Municipal Corporation Act, 1888 (hereinafter referred to as the Corporation Act). The contract involves public money to the tune of rupees four crores.

2. The first Respondent has undertaken a massive programme of improvement of roads. Normally the work of construction and/ or repairs of roads is supervised by the Municipal Officers and is randomly checked by the Vigilance Department of the first Respondent. As there was a criticism of general road conditions in city of Mumbai, the first Respondent appointed Standing Technical Advisory Committee (for short STAC) under the chairmanship of one Shri N. V. Merani, a retired Principal Secretary of the Public Works Department of the Government of Maharashtra. The Committee was asked to evaluate all road related issues and advise on all aspects of road construction, design, maintenance and beautification for achieving better quality of roads. The said Committee submitted its recommendations. The Committee inter alia recommended that the quality audit of the road work should be carried out and the work of quality audit should be entrusted to third parties. The Committee stated names of four local firms and suggested that said local firms may be approached for taking over the quality audit involving visits to the works atleast once in a month and also at the time of taking over the work of the completed road from the concerned contractor. The Committee recommended that a suitable clause will have to be added in the tender of the road work contractors to ensure that the contractors provide requisite facilities to the quality audit teams.

3. In August, 2005 first Respondent called for quotations from seven organisations for the work of quality audit of the twenty three works of concretisation of roads and thirty-five works of asphalt roads. The said works were already commenced by that time. The last date for submitting quotations by the said seven chosen organisations was 22nd August, 2005. Out of seven, only four namely, the fourth to seventh Respondents herein submitted their quotations. The quotations were received in two packets. The first packet containing technical bid was opened on 22nd August, 2005 and the second packet containing financial bid was opened on 16th September, 2005. The Commissioner of the first Respondent submitted proposal on 22nd November, 2005 before the Standing Committee recommending that contracts may be awarded to the Respondent Nos.4 to 7 without inviting tenders. The reason given in the said proposal for dispensing with requirement of inviting tenders was that only a few selected organisations are working in the field and therefore, no effective purpose will be served by inviting tenders. The Standing Committee of the first Respondent passed a resolution dated 12th December, 2005 granting approval to the proposal submitted by the Commissioner. It was stated in the resolution that for the reasons recorded in paragraph No.9 of the proposal submitted by the Commissioner, contracts may be awarded without inviting tenders by publication of public

notice.

4. The Petitioner No.1 claims to be a Project Management Consultant with large experience in the field of project management consultancy work in the State of Maharashtra, Gujarat and Madhya Pradesh. The contention of the Petitioners is that the Petitioners have carried out similar quality audit work elsewhere. Another contention is that there are sixteen reputed consultants in the same field available in Mumbai, Thane and New Bombay. List of said consultants is annexed to the Petition. The Petition was lodged on 19th December, 2005. On 23rd December, 2005, this Court passed an order directing the first Respondent to file a reply. This court ordered that all steps taken by the first Respondent will be subject to the further orders which may be passed in this Petition. The work orders were issued in favour of the Respondent Nos.4 to 7 on 20th December, 2005 and the said Respondents were asked to start the work from 01st January, 2006.

5. This Petition was earlier heard on 18th January, 2006. After hearing the learned Counsel appearing for the parties for sometime, this Court suggested to the learned Counsel appearing for the first Respondent to take instructions as to whether the first Respondent would reconsider its decision of awarding contracts without inviting tenders. On the same day we

directed the Petitioners to serve notices on the Respondent Nos.4 to 7 informing them that on the next date the Petition will be disposed of finally at admission stage. The learned Counsel for the Petitioners has placed on record the postal acknowledgments of notices served on the Respondent Nos.4 to 7 and has stated that the Respondent Nos.4 to 7 have been duly served with the notices. He has also filed affidavit of service. However, none of the said Respondents have appeared. No reply has been filed by the said Respondents.

6. The learned Senior Counsel Shri Subramaniam appearing for the Petitioners submitted that the first Petitioner possesses necessary qualification and experience to do work of quality audit. He pointed out that there are sixteen reputed organisations in Mumbai, Thane and New Bombay who are qualified to do the work of quality audit and this factual aspect pleaded in the Petition has not been denied by the first Respondent. He pointed out that the translation of the proposal of the Commissioner dated 22nd November, 2005 supplied to the Petitioners is not correct and he invited our attention to a copy of the original Marathi proposal. He submitted that the requirement of inviting tenders could have been dispensed with provided that Standing Committee had passed a resolution recording its own reasons for dispensing with the requirement for inviting

tenders. He submitted that the Standing Committee has merely stated in the resolution that it is not necessary to invite the tenders in view of what is stated in paragraph No.9 of the proposal submitted by the Commissioner. He invited our attention to the paragraph No.9 of the proposal. When translated from marathi it reads as follows : 'There are only a few firms operating in their field. Hence, inviting tender would not have served the desired objective'. He pointed out that the said statement is factually incorrect. He invited our attention to the rates quoted by the Respondent Nos.4 to 7. He pointed out that one Shri Karveer who is a partner of the Respondent No.7-Firm was an employee of the City and Industrial Development of Maharashtra Ltd. and has retired only few months back. He placed reliance on certain decisions of the Apex Court and contended that there were no compelling circumstances in existence for dispensing with the normal requirement of inviting tenders.

7. Shri Singhvi, learned Senior Counsel appearing on behalf of the first Respondent stated that the Petition has been belatedly filed. He submitted that the first Petitioner is not qualified to do the work of quality audit and therefore, this Petition at the instance of the Petitioners is not maintainable. He relied upon report of the STAC and stated that as per the recommendations of the said Expert Committee, the

first Respondent requested the seven available organisations which were doing this work to submit their quotations. He pointed out that a Division Bench of this Court had also expressed in favour of such external audit in view of the heavy monsoon in July 2005 severely damaging the roads. He pointed out that only the fourth to seventh Respondent submitted their proposals and after due scrutiny of the proposals, contracts have been already awarded to the said Respondents. He submitted that there is a power vesting in the first Respondent of dispensing with requirement of inviting tenders and the said power has been exercised in accordance with law. He submitted that though the Standing Committee may not have recorded any separate reasons, the said Committee has adopted the reasons incorporated in the proposal of the Commissioner of the first Respondent. He submitted that if the first Respondent has acted within the four corners of law, the decision of the first Respondent cannot be interfered with, especially, when quality control audit is required for ensuring that the quality of roads constructed in the city is up to the mark. He has taken us through some of the decisions of the Apex Court.

8. We have carefully considered the rival submissions. Section 72 of the Corporation Act reads thus:

"72. Tenders to be invited for contracts

involving expenditure exceeding Rs.50,000/-

(1) Except as is hereinafter otherwise provided, the Commissioner shall at least seven days before entering into any contract for execution of any work or the supply of any materials or goods which will involve an expenditure exceeding (Fifty Thousand Rupees) give notice by advertisement in the local newspapers, inviting tenders for such contract.

(2) The Commissioner shall not be bound to accept any tender which may be made in pursuance of such notice, but may accept, subject to the provision of clause (c) of Section 69, any of the tenders so made which appears to him, upon a view of all the circumstances to be the most advantageous.

(3) Provided that the Standing Committee or in the case of a contract to be entered for the purposes of clause (q) of Section 61, the Education Committee may authorize the Commissioner, for

> reasons which shall be recorded in their proceedings, to enter into a contract without inviting Tenders as herein provided or without accepting any Tender which he may receive after having invited them."

There is no dispute between the parties that in normal circumstances contracts could not have been awarded to the Respondent Nos.4 to 7 without inviting tenders. Sub-section 3 of Section 72 of the Corporation Act is an exception to the general rule of awarding contracts only after inviting tenders by a public notice. The sub-section 3 provides that the Standing Committee for reasons recorded in the proceedings may authorise the Commissioner to enter into contract without inviting tenders. On plain reading of the resolution dated 12th December, 2005 passed by the Standing Committee it is obvious that in the proceedings of the Standing Committee there are no independent reasons recorded for dispensing with the requirement of inviting tenders. The resolution merely refers to the paragraph No.9 of the proposal submitted by the Commissioner and states that for the reasons set out in paragraph No.9 of the proposal, the Commissioner is authorised to enter into contracts without inviting the tenders. Perusal of the paragraph No.9 of the proposal shows that it is merely stated that only

selected few organisations are dealing with work of quality control audit and therefore no purpose will be served by inviting tenders.

9. The requirement of the statute is that the Standing Committee must record reasons in its own proceedings. The Standing Committee has not recorded any separate reason but has relied upon the reason given in the proposal of the Commissioner. Our attention as invited by Shri Subramaniam, the learned Senior Counsel appearing for the Petitioners to the decision of the Apex Court in the case of Haji T.M. Hassan Vs. Kerala Financial Corporation (AIR 1998 Supreme Court, 157). In the said decision, the Apex Court quoted with approval the observations made in its earlier decision reported in AIR 1987 Supreme Court, 1109 (Sachidanand Pande Vs. State of West Bengal) to the following effect :

> "On a consideration of the relevant cases cited at the bar the following propositions may be taken as well established: State owned or public owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest when it is

considered necessary to dispose of a property is to sell the property by public auction or by inviting tenders. **Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice."**(Emphasis supplied)

10. Dispensing with the requirement of inviting tenders is an exception to the general rule. We are of the view that dispensing with the requirement of inviting tenders is not an empty formality. The Apex Court in a decision reported in AIR 2005 Supreme Court, Page 34 (Nandkishor Gajanan Joshi Vs. Commissioner of Municipal Corporation of City of Kalyan) has held in paragraph 17 thereof that when the Standing Committee considers the proposal for granting sanction or approval to the contract, the process of granting approval cannot be an empty formality. The Standing Committee has a duty to act in public interest as also fairly and in a reasonable manner. The Standing Committee should have considered whether it was necessary to dispense with requirement of inviting tenders. There is nothing on record to show

that Committee has considered all relevant aspects.

11. As held by the Apex Court in the case of Haji T.M. Hassan, for making departure from the well settled rule, there must exist compelling circumstances. Turning back to the present case, the Expert's Committee namely STAC recommended names of four experts. Out of the four names suggested by the Committee only two namely the Respondent Nos.4 and 5 have been appointed by the first Respondent. The documents produced before us by the first Respondent-Corporation show that there is a large difference in the amounts quoted by the Respondent Nos.4 to 7 in their proposals. The figures quoted by the Respondent Nos.4 and 5 are Rs.99 lakhs and 90 lacs. The figure of the Respondent No.6 is above Rs.1.5 crores and that of the Respondent No.7 is above Rs.52 lakhs. The Expert Committee had suggested four names. The STAC Committee had suggested names of only the Respondent Nos.4 and 5. The names of the Respondent Nos.6 and 7 were not suggested by STAC. There is no explanation as to how they found favour with the Respondents. Moreover, there is nothing on record to show as to why proposals were invited from seven organisations by the first Respondent-Corporation. In the Petition there is a clear assertion that there are sixteen organisations available in the City of Mumbai, Thane and Navi Mumbai

who are dealing with the quality control audit. The names of the said sixteen organisations have been annexed to the Petition. The said names are of Tata Consultant Engineer, L and T Ramboll, DAR Consultant (I) Pvt. Ltd. etc. More than one affidavits have been filed by the first Respondent. In the said affidavits there is no denial of the averments made in the Petition that there are sixteen reputed consultants who can do the job.

12. The work involved is of quality control audit in respect of construction of roads which had already started in May-June 2005. The construction is likely to take eighteen to twenty months time. The first Respondent invited offers in August 2005. The proposal submitted by the Commissioner itself indicates that the technical bid was opened on 22nd August, 2005 and the financial bid was opened on 16th September, 2005. The Commissioner submitted the proposal more than two months thereafter, that is, on 22nd November, 2005 which is approved by the Standing Committee on 12th December, 2005. This indicates that corporation has shown no compelling urgency to appoint quality control auditors. Considering the time taken by the first Respondent, it is obvious that tenders could have been invited to achieve the same result by the normal method without departing therefrom.

13. It is also pertinent to note that paragraph No.9 of the proposal of the Commissioner proceeds on erroneous basis that there are only a few organisations doing the work. In the present case, the fact that there are sixteen organisations doing the work is not denied on oath by the first Respondent. Thus, the proposal was submitted without having regard to the fact that there are about sixteen organisations doing the work in the field and the proposal proceeds on incorrect assumption that there are only selected few organisations working in the field. Thus, the authority concerned has proceeded to take decision disregarding the actual and undeniable facts. Therefore, power of judicial review under Article 226 of the Constitution of India will have to be exercised.

14. We are of the view that the action of the Standing Committee of permitting the Commissioner to enter into the contracts without inviting tenders is illegal as no reasons have been recorded in the proceedings of the Standing Committee. Even assuming that paragraph No.9 of the proposal submitted by the Commissioner can be read as the reason for dispensing with the requirement of inviting tenders, it is obvious that said reason proceeds on erroneous assumption that there were only very few organisations dealing with the work.

15. Shri Singhvi, the learned Counsel appearing for the first Respondent tried to argue that if this Court interferes at this stage, it will affect the work of repairs or reconstruction of the roads which is of vital importance to the citizens of Mumbai. It is very difficult to agree with this submission. We are concerned with the work of quality control auditing. This work has been started by the Respondent Nos.4 to 7 according to the case of the first Respondent only from 01st January, 2006. The work is of taking periodical inspection of the road work and of taking inspection at a stage when work is complete. The Municipal Corporation can always undertake the tender process expeditiously. The advantage of inviting tenders will be that other experts in the field may come forward and submit better offers. The work of construction of roads is likely to take many more months. Till finalisation of tenders, the Municipal Officers can periodically check the road work which is otherwise done in other cases. Therefore, interference by this Court will not affect the work of construction or supervision of roads.

16. So far as eligibility of the Petitioners is concerned, we are not recording any reasons as there is a dispute raised by the first Respondent. Suffice it to say that in the Petition there are averments

made to the effect that the Petitioner No.1 is qualified and some instances of similar work allegedly done by the Petitioner No.1 has been annexed to the Petition. In any case the Petition cannot be rejected only on that ground.

17. The Petition must succeed. Accordingly, the contracts entered into by the first Respondent in favour of the Respondent Nos.4 to 7 are quashed and set aside. The first Respondent will proceed expeditiously in accordance with law by inviting tenders. We make it clear that the first Petitioners and the Respondent Nos.4 to 7 will be entitled to submit their bids if tenders are invited by the first Respondent-Corporation. Rule is made absolute accordingly with no orders as to costs.

(H.L. GHOKHALE,J.)

(ABHAY S. OKA,J.)